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In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-410

SOO LINE RAILROAD COMPANY,

Petitioner,

v.

R. H. FULTON, d/b/a R. H. FULTON, CONTRACTOR,

Respondent.

No.

R. H. FULTON, d/b/a R. H. FULTON, CONTRACTOR,

Petitioner,

v.

SOO LINE RAILROAD COMPANY
and CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT, R. H. FULTON, d/b/a R. H. FULTON, CONTRACTOR, AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

R. H. Fulton, d/b/a R. H. Fulton, Contractor (hereinafter called "Fulton"), prays that the Petition for a Writ of Certiorari be denied, but in the alternative, he files a Conditional Cross-Petition for a Writ of Certiorari which he asks to be granted only if the Petition of Soo Line Railroad Company (hereinafter called "Soo") is granted.

STATEMENT

The "Statement of the Case" in Soo's Petition omits significant facts. Prior to a trial on the merits, the District Court conducted a jurisdictional hearing on Soo's motion to dismiss and concluded it had juridiction over Soo. 320 F. Supp. 75 (W.D.Mo. 1970).

In view of the remand of Fulton's claim against Soo, the 8th Circuit did not pass on numerous points of error raised below, and the court's remand was without prejudice to Soo's filing a motion to transfer the case to Minnesota pursuant to 28 U.S.C. § 1404.

ARGUMENT

"Reasons for Denying the Writ"

The petition of Soo presents nothing worthy of review by this Court. It consists only of the claims of another non-resident defendant, who is not precluded from seeking a more convenient forum in its own state, objecting to the grasp of a state's long-arm statute.

Despite the assertions of the petition, Soo's claims plainly have no consequence beyond the particular facts and the immediate parties to this litigation.

The 8th Circuit, being Erie bound, rightfully followed the Missouri courts' interpretation of Missouri's long-arm statute, § 506.500 V.A.M.S., concluded service on Soo was statutorily authorized, and had no difficulty with the constitutional question in holding Soo had the requisite minimum contacts. Significantly, Soo has not urged in its peti-

tion to this Court that it did not have sufficient minimum contacts in the State of Missouri.

There is nothing novel or monumental about the court's holding that the United States District Court had jurisdiction over Soo. Illinois, Tennessee, Texas and other states have intended to assert jurisdiction over non-resident defendants to the extent permitted by the Constitution. *See Fisons, Ltd. v. United States*, 458 F. 2d 1241 (7th Cir.), *cert. denied*, 405 U.S. 1041, 92 S. Ct. 1312 (1972); *Eyerly Aircraft Co. v. Killian*, 414 F. 2d 591 (5th Cir. 1969); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F. 2d 374 (6th Cir. 1968).

Similarly, Missouri court have construed § 506.500 as intending to reach the constitutional limits. *Missouri ex rel. Deere & Co. v. Pinnell*, 454 S.W. 2d 889 (Mo. Sup. Ct. 1970) (en banc). The 8th Circuit stated this would be a third independent ground for finding jurisdiction but found it unnecessary to take this view (Court's Opinion p. 12, n. 5).

Soo's effort to distinguish *State ex rel. Apco Oil Co. v. Turpin*, 490 S.W. 2d 400 (Mo. App. 1973) by stating the ruling was made at the pleading stage is totally without merit.

Soo argues that the 8th Circuit Opinion is in conflict with two 6th Circuit cases. These cases did not involve a construction of the Missouri long-arm statute and the opinions did not conclude jurisdiction was not obtained over the non-resident defendants. Interestingly enough, the two 6th Circuit cases Soo claims conflict with the court below, were

actually relied upon by the 8th Circuit in holding the Carmack Amendment preempted common law negligence. Soo's assertion that the opinion below is in conflict with *W. D. Lawson & Co. v. Penn Central Co.*, 456 F. 2d 419 (6th Cir. 1972) is undeniably inaccurate. Although the 6th Circuit concluded that the Carmack Amendment preempted common law liability, the court ruled that it had jurisdiction over Ft. Worth & Denver Railroad, the initial carrier who issued the bills of lading, and it affirmed the judgment against this railroad under the Carmack Amendment. Similarly, in *American Synthetic Rubber Corp. v. Louisville & N.R.R. Co.*, 422 F. 2d 462 (6th Cir. 1970), suit was not against the initial carrier, Missouri Pacific Railroad, who issued the bills of lading. While the 6th Circuit did uphold removal of the case to the federal court from the state court, and concluded that Carmack preempted common law negligence, there was no holding regarding jurisdiction or service under the long-arm statute.

The alleged conflict is non-existent and the decision of the Court of Appeals affirming the overruling of Soo's motion to dismiss is manifestly correct. It is not in conflict with decisions of other courts of appeals, and most certainly it does not involve an unsettled or novel question or any critical issue of federal law which would warrant review by this Court.

Moreover, not one of the "questions presented" stated in the petition has any merit. Although Soo contracted with Fulton in issuing the bills of lading, the duty of the railroad is specified by statute, and the parties are not free to alter

that duty by their contract. The duty imposed on Soo in transporting Fulton's machinery is based on the law of negligence and sounds in tort. 49 U.S.C. § 20(11); *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 143-44 (1964); *Missouri K. & T. Ry. Co. v. Harriman*, 227 U.S. 657, 672 (1913); *Lux Art Van Serv., Inc. v. Pollard*, 344 F. 2d 883 (7th Cir.), *cert. denied*, 382 U.S. 837 (1965); *United States v. Reading*, 289 F. 2d 7 (3rd Cir. 1961); *Watson Bros. Traps. Co. v. Feinberg Kosher Sausage Co.*, 193 F. 2d 283 (8th Cir. 1951); *Seaboard Airline R.R. Co. v. Lake Region Packing Assoc.*, 211 So. 2d 25 (Fla. App.), *cert. denied*, 221 So. 2d 748 (Fla. 1968); 52 Am. Jur. § 26, p. 379; *See also id.* at § § 27-28.

Soo's petition, therefore, is baseless. It presents only a private jurisdictional dispute, and if Soo feels it is greatly inconvenienced by litigating in Missouri, it is not precluded by the Court of Appeals from seeking a transfer to Minnesota.

CONCLUSION

For these reasons, as well as those detailed in the Opinion below, the Petition for Writ of Certiorari should be denied.

RESPONDENT'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Fulton petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the 8th Circuit entered in these causes; the writ to

issue, however, only in the event that this Court grants the petition for writ of certiorari in No. 73-410.

JURISDICTION

Judgment of the Court of Appeals was entered on April 27, 1973 (Appendix A, Soo's Petition). A timely petition for rehearing was filed by Fulton, and it was denied by the Court of Appeals on June 4, 1973 (Appendix C, Soo's petition). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Although the trial court purported to submit Fulton's claim as to Chicago, Rock Island and Pacific Railroad Company (hereinafter referred to as "Rock Island") under the Carmack Amendment, in actuality the trial court erred in not giving Fulton the benefits and presumptions he was entitled to under this statute and it thereby deprived him of the benefits Congress and the courts intended to convey to a shipper who sustains damages from an interstate shipment. The trial court committed reversible error by incorrectly instructing the jury on the railroad's duties, burden of proof, and in not giving Fulton the presumption he was legally entitled to under the bills of lading, the Carmack Amendment, and the evidence. Therefore, the questions presented are:

1. Did the Court of Appeals err in holding that the Carmack Amendment preempted common law liability?

2. Did the Court of Appeals err in not holding that the trial court erred in charging the jury that, as a matter of law, the responsibility for loading the machinery which was ultimately damaged was upon Fulton?

3. Did the Court of Appeals err in not reversing and remanding Fulton's claim against Rock Island because of the trial court's erroneous instructions that:

(a) as a matter of law, the responsibility for loading the machinery was upon Fulton;

(b) there were two issues: (1) whether the load shifted, or (2) whether the counter-weight rack drifted;

(c) there was no negligence on Rock Island of improper inspection unless the jury found the load had shifted;

(d) Rock Island's employees were only required to exercise ordinary care in a roll-by inspection.

STATUTES

The pertinent portions of applicable statutory provisions are:

1. 49 U.S.C. § 20(11) which states:

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an ad-

jacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt of bill of lading or in any contract, rule, regulation, or in any tariff with the Interstate Commerce Commission; any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void.

2. 49 U.S.C. § 101 which provides:

> [t]he carrier may also, by inserting in the bill of lading the words 'shipper's weight, load, and count,' or other words of like import, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading of by the non-receipt or by the misdescription of the goods described in the bill of lading: * * *

STATEMENT OF THE CASE

Fulton plead the Carmack amendment, and in the alternative, common law negligence — both in the main action and in the defense of Rock Island's damage claim (248-258). The trial court refused to submit separate negligence issues as to Rock Island, and the Court of Appeals concluded the Carmack Amendment preempted common law liability.

Fulton urged points of error below dealing with erroneous instructions and improper submission by the trial court at the conclusion of the five week trial. Apparently, because of the remand as to Soo, the court did not give consideration to a number of points of error urged below. In overruling Fulton's petition for rehearing, the 8th Circuit refused to pass on Fulton's third point of error below, which had been extensively briefed. Fulton vigorously urged that the trial court erred in charging that under the straight bills of lading the duty of loading was on Fulton as a matter of law, but the 8th Circuit did not discuss the pertinent federal statute or the appropriate case law. These erroneous instructions of the trial court tainted not only the submission of Fulton's cause of action against Soo, but the cause of action against

Rock Island as well. Thus, Fulton is entitled to a new trial as to Rock Island as well as Soo. The trial court's instructions effectively charged the jury that if there was any negligence in loading, it was that of Fulton. As a result, Fulton was deprived of the benefits under Carmack. Moreover, the district court ignored the case law of *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964), and placed responsibility for loading on Fulton as a matter of law, despite the fact that Soo had not issued shipper's load and count bills of lading pursuant to 49 U.S.C. § 101.

ARGUMENT

1. There is a conflict among the circuits.

There is a clear conflict among the circuits on the issue of whether the Carmack Amendment preempted suits, in the alternative, for specific negligence. The 10th Circuit has concluded a shipper is not preempted. *Litvak Meat Co. v. Baker*, 446 F. 2d 329 (10th Cir. 1971). However, the 6th Circuit has ruled the Carmack Amendment, alone, is a shipper's sole remedy. *W. D. Lawson & Co. v. Penn Central Co., supra; American Synthetic Rubber Corp. v. Louisville & N.R.R. Co., supra.* In its opinion below, the 8th Circuit adhered to the views of the 6th Circuit to the exclusion of the 10th Circuit. The 9th Circuit, however, adheres to the view of the 10th Circuit. *Johnson v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 400 F. 2d 968 (9th Cir. 1968). Fulton pled Carmack, and in the alternative, specific acts of negligence (248-258). Rule 8(e) (2) of the Federal Rules of Civil Procedure provides:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically either

> in one count or defense or in separate counts or defenses, * * * A party may also state as many separate claims or defenses as he has regardless of consistency * * *.

The intent of this Rule is apparent and has been stated in MOORE, FEDERAL PRACTICE, § 831(2) (1972) as follows:

> Under Rule 8(e)(2) either party may plead in the alternative, either in one count or defense, or in separate counts or defenses. This provision is supplemented by Rule 8(a)(3), which provides that relief in the alternative may be demanded, and by Rule 18(a), which permits joinder as independent or alternative claims of all the claims which a party may have.
>
> A pleading may present alternative statements of the facts, or alternative legal theories * * *.

If the petition of Soo is granted in No. 73-410, this Court should review the whole case and resolve the conflict currently existing between the circuit courts.

2. Fulton is entitled to a new trial as to both Rock Island and Soo because of errors in instructions to the jury.

It is a well settled rule of law that under straight bills of lading as were issued by Soo in this case the burden of loading a shipment is upon the carrier. *New Amsterdam Cas. Co. v. Novick Transfer Co.*, 274 F. 2d 916, 924 (4th Cir. 1960); *United States v. Savage Truck Line*, 209 F. 2d 442 (4th Cir. 1953); *Jones v. Thompson*, 360 Mo. 285, 228 S.W. 2d 673 (1950) and authorities cited therein; *Hines v. Buchanan*, 131 Va. 88, 109 S.E. 219 (1921); MILLER, LAW OF FREIGHT LOSS AND DAMAGE CLAIMS § 420.1 (1953); Annot., 44 A.L.R. 2d 984, 999 (1955). It should be noted that neither

Rock Island nor Soo has cited any authority contrary to this proposition, and it is undisputed that the bills of lading in question were not of the shipper's load and count variety (P. Ex. 111-116, 119 & 130).

There are two ways by which the carrier's common law duty to load freight can be abrogated. First, 49 U.S.C. § 101 (1958) provides:

> [t]he carrier may also, by inserting in the bill of lading the words 'shipper's weight, load, and count,' or other words of like import, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill of lading: * * *

Under a "shipper's load count" bill of lading which the above statute authorizes, there is no doubt that the shipper of freight undertakes the responsibility of loading his goods. If such loading is improperly done and damage is caused thereby, the shipper must sustain whatever loss is occasioned by his own improper loading techniques. *Minneapolis, St. Paul and Sault Ste. Marie Railroad Co. v. Metal-Matic, Inc.*, 323 F. 2d 903 (8th Cir. 1963). However, where the above statute is not invoked by the requisite statutory language contained upon the bill of lading, the quoted language has no applicability. *Tushman v. Pennsylvania Railroad Co.*, 230 F. 2d 787 (3d Cir. 1956). The bills of lading involved in the instant case (P. Ex. 111-116, 119, & 130) were not of the "shipper's load and count" variety and, hence, these bills of lading did not abrogate Soo's responsibility to load Fulton's equipment in a non-negligent manner.

It is also possible for a carrier to be relieved of its duty to load if the shipper agrees to accept that responsibility. Upon the assumption of that obligation, the carrier becomes liable only for those defects in loading which are latent and concealed, and which are not discoverable by ordinary observation on the part of the carrier. *Armour Research Foundation v. Chicago, Rock Island and Pacific R.R. Co.*, 297 F. 2d 176 (7th Cir. 1961); *United States v. Savage Truck Line, supra.*

The undisputed facts in the record show Soo did not elect to pass to Fulton responsibility for "improper loading" under 49 U.S.C. § 101, and it is abundantly clear that Fulton did not assume the responsibility for loading. While Fulton's employees performed physical acts involved in loading the rail cars, these employees were required to comply, and did comply, with all instructions given and changes required by Soo's inspector Knutsen with respect to preparing the equipment for shipment (994, 998, 999, 1001, 1011, 1014, 1022, 1130, 1133, 1134, 1140, 1141, 1161, 1163, 1186, 1187, 1202, 1582, 1584, 1586, 1588, 1589, 1598, 1599, 1806, 1809, 1819, 1820, 1826-29).

Despite the testimony of record which clearly indicates Knutsen took an active part in loading Fulton's equipment, and despite the prevailing rule that carriers are responsible for the loading of shipments which they transport, the trial court unequivocally charged the jury, as a matter of law, that the duty to load the equipment was upon Fulton. The court's instructions were:

> First I say to you, I charge you, that, as a matter of law, it is the duty and the responsibility of the shipper

> to load the products upon the car. I think there is no dispute but what they did that (292).

Not only did this statement by the court place upon Fulton a duty contrary to law and one which he had not assumed, but also was patently inaccurate in stating that there was no dispute over the duty and responsibility of loading. In his charge to the jury, the trial court chose to overlook page upon page of testimony referred to above which clearly indicated that there was substantial dispute as to who had the duty and responsibility of loading Fulton's equipment. The 8th Circuit recognized that dispute by stating in its opinion:

> It was and is a hotly contested question whether Soo's employee was an active supervisor or passive inspector. (p. 2, Court's Opinion)

Fulton submits that while the issue may be hotly contested, there can be no doubt as to its resolution in that Knutsen clearly gave instructions which required action in order to obtain his approval for shipment of the equipment. He ordered cables rearranged, changes in stake pockets, and reclamping of cables and reblocking. He ordered that equipment be repositioned and that different size cable be used. These instructions are not the actions of a passive inspector, but of a supervisor whose orders must be carried out in order to have the shipment approved (1138).

Moreover, the court's error in charging that the responsibility for loading the equipment was upon Fulton cannot be disregarded as being an isolated portion of the court's charge to the jury in that the court further charged the jury as follows:

> Now, members of the jury, the employees of Mr. Fulton were in charge of this, and he is responsible for what-

> ever acts they perform, just as the railroad company is responsible for the acts of its employees and servants (292).

And:

> Now then, as between a shipper and a carrier of goods, it is incumbent upon the shipper to reasonably and securely prepare the goods for loading and to load the goods * * * (294).

The court unqualifiedly placed the responsibility for loading upon Fulton. Nowhere in the court's charge to the jury was there any indication or conflicting instruction to the effect that the responsibility for loading was upon Soo, or even that there was a question for the jury as to whether Fulton had undertaken the duty of loading his equipment.

It was not only prejudicial error to charge the jury that Fulton had the duty and responsibility of loading his equipment, but that under the authorities cited, the court's instructions should have been that as a matter of law Soo had the legal duty and responsibility of loading Fulton's equipment under straight bills of lading that were issued. Had the jury been properly instructed in this respect, they surely would not have found for Rock Island on Fulton's claim.

In the alternative, there was at least a question of fact as to whether Fulton had assumed the underlying duty and responsibility of loading his equipment. There was an abundance of testimony concerning the role which Fulton's employees and Knutsen played in seeing that the equipment

was loaded. The issue should not have been determined as a matter of law, for such a determination is proper only where the evidence is all on one side or so overwhelmingly on one side as to leave no doubt that fair minded men could not honestly draw different conclusions from the evidence. *Chicago, Great Western Ry. Co. v. Scovel,* 232 F. 2d 952 (8th Cir. 1956). Under the conflicting testimony, Fulton was entitled, at the very least, to have the jury determine whether he assumed the duty of loading which is normally upon the carrier. The court's error affected Fulton's substantial rights as against both Rock Island and Soo. Rule 61, Fed. R. Civ. P.

After the five week trial, the case bristled with factual issues as to the liability of both Soo and Rock Island. The trial court's instructions that there were only two issues: (a) whether the load shifted, or (b) whether the counterweight rack drifted, and that there was no negligence of Rock Island of improper inspection unless the jury found the load shifted (1890), effectively deprived Fulton of the benefits of Carmack and was clearly reversible error. *Missouri Pac. R.R. Co. v. Elmore & Stahl, supra.* Moreover, the instruction that Rock Island was responsible only ". . . for ordinary care in what they called a roll-by inspection..." (300, 1890), was contrary to the duty Rock Island voluntarily assumed to see that Fulton's equipment was centered on the railcars at terminal points such as Trenton (442-446, 454-455). *Indian Towing Co. v. United States,* 350 U.S. 61 (1955).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the petition for writ of certiorari in No. 73-410, then it should grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of this Brief in Opposition and Conditional Cross-Petition for Writ of Certiorari for R. H. Fulton, d/b/a R. H. Fulton, Contractor, were, on this 27 day of September, 1973, served by United States air mail, postage prepaid, upon each of the following: Robert A. Brown, Brown, Douglas & Brown, 510A Francis Street, St. Joseph, Missouri, Attorneys for Soo Line Railroad Company, and to Thad McCanse, James and McCanse, 1750 Home Savings Building, 1006 Grand Avenue, Kansas City, Missouri, Attorneys for Chicago, Rock Island and Pacific Railroad Company.

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FILE COPY

Supreme Court, U. S.
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OCT 29 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

~~No. 73-410~~

~~SOO LINE RAILROAD COMPANY, Petitioner,~~

~~vs.~~

~~R. H. FULTON, d/b/a R. H. FULTON, CONTRACTOR, Respondent.~~

No. 73-577

R. H. FULTON, d/b/a R. H. FULTON, CONTRACTOR, *Petitioner*,

vs.

SOO LINE RAILROAD COMPANY and CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Respondents*.

BRIEF IN OPPOSITION FOR RESPONDENT, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD TO R. H. FULTON'S "CONDITIONAL" CROSS-PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-410

SOO LINE RAILROAD COMPANY, *Petitioner,*
vs.
R. H. FULTON, d/b/a R. H. FULTON,
CONTRACTOR, *Respondent.*

No. 73-577

R. H. FULTON, d/b/a R. H. FULTON,
CONTRACTOR, *Petitioner,*
vs.
SOO LINE RAILROAD COMPANY and CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Respondents.*

BRIEF IN OPPOSITION FOR RESPONDENT, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD TO R. H. FULTON'S "CONDITIONAL" CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported in 481 F. 2d 326.

JURISDICTION

Judgment of the Court of Appeals was entered on April 27, 1973. Fulton's petition for a rehearing was denied on June 4, 1973. Soo Line mailed its petition for a writ of certiorari to the clerk of this court on September 1, 1973. Fulton's "Conditional Cross-Petition for a Writ of Certiorari" was served on respondent Rock Island on September 28, 1973. Petitioner Fulton invokes jurisdiction under 28 U.S.C. Sec. 1254(1). This court does not have jurisdiction to entertain the "Conditional Cross-Petition" under U.S. Supreme Court Rule 22(3) and 28 U.S.C. Sec. 2101(c).

ARGUMENT

The time limitations set forth in Supreme Court Rule 22(3) and 28 U.S.C. Sec. 2101(c) must be complied with before this court has jurisdiction to review this case on certiorari. Fulton's "Conditional Cross-Petition" was filed more than 90 days after the judgment it seeks review upon and under the aforesaid rule and statute was therefore not timely.

Unlike the situation involving criminal cases, where this court has held that timeliness for the Petition for Writ of Certiorari is not jurisdictional, see, for example, *Durham* v. *U. S.*, 401 U.S. 481 [1969], with respect to civil cases, jurisdiction will not lie if the petition is untimely. *Toledo Scale Company* v. *Computing Scale Company*, 261 U.S. 399; *Scofield* v. *National Labor Relations Board, et al.*, 394 U.S. 423, 427; *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U.S. 206. See also, *Bradford Electric Company* v. *Clapper*, 284 U.S. 221.

The time for filing the Petition for Writ of Certiorari begins to run when the lower court's decision is final. *Federal Trade Commission* v. *Minneapolis-Honeywell Company, supra.* In the case at bar the time began to run on June 4, 1973, when Fulton's petition for rehearing was denied. *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U.S. 448 (1919). Rock Island's counsel received Fulton's brief in opposition to Soo Line's Petition for Certiorari and "Conditional Cross-Petition" for Writ of Certiorari on September 28, 1973. Under Title 28 U.S.C. Sec. 2101(c) one seeking a writ of certiorari before the Supreme Court shall apply for the writ within 90 days after the entry of judgment or decree by the lower

court. Ninety days from June 4, 1973, was Sunday, September 2, 1973. Monday, September 3 was Labor Day and the first business day after the Labor Day weekend was September 4. This was the last day for filing a Petition for Writ of Certiorari.

The Eighth Circuit's "Conclusion", entered on April 27, 1973, was as follows:

> "The judgment for Rock Island on Fulton's claim against the Rock Island and for Fulton on Rock Island's counterclaim is affirmed. The judgment in favor of Soo Line is vacated and the cause is remanded for another trial on Fulton's claim against Soo in accordance with the views expressed in this opinion." 481 F. 2d at 339.

The record in the trial court shows that separate judgments were entered as to Soo Lines and the Rock Island (327, 328). Obviously, what Fulton has filed is a separate Petition for a Writ of Certiorari asking this court to review a separate judgment.

Fulton may not use Soo Line's petition for review of the judgment pertaining to Soo Line as a vehicle for launching his own attack on the judgment rendered in favor of the Rock Island. 7 Moore *Federal Practice* (2d Ed.) Sec. 72.05(3). If, in fact, Fulton was dissatisfied with the portion of the decision affirming the trial court's decision with respect to the Rock Island, his recourse was to petition for a writ of certiorari from that judgment.

Although the Supreme Court Rules no longer refer to cross-petitions for certiorari or cross-appeals (let alone "Conditional" Cross-Petitions), it has long been recognized that the term "cross-appeal" or "cross-petition" is used to refer to an appeal by an appellee against the first

appellant, while the term "separate appeal" is used to refer to an appeal which is neither the first appeal nor a cross-appeal. 7 Moore *Federal Practice* (2d Ed.) Sec. 72.05 [2]. In the present case in the trial court there were separate judgments entered on separate jury verdicts (327, 328). In the Eighth Circuit, the judgment in favor of Soo Line was reversed and remanded, while the judgment involving the Rock Island was affirmed. 481 F. 2d 326, 339. Fulton has 90 days from June 4, 1973, to seek a review of the Rock Island judgment. He failed to do so. Even if there were not separate judgments, Fulton would still be out of time. As pointed out in the concurring opinion in *Tallman* v. *Udall*, 324 F. 2d 411 (D.C. App., 1963):

> "It may seem anomalous at first blush that a successful litigant in a lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him he must preserve his rights by appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings."

The general principles to be stated as to the necessity for either cross or separate appeals are equally applicable where review by the Supreme Court is by certiorari.

Marley Company v. *Maryland Casualty Co.*, 300 U.S. 185; *Ryerson* v. *U. S.*, 312 U.S. 405; 7 Moore *Federal Practice* (2d Ed.) Sec. 72.05(1). The consequences of a failure to file a separate appeal, or as here, a separate petition for a writ of certiorari, are well illustrated by the case of *United States* v. *Bertman*, 377 U.S. 995, the facts of which are set forth in the dissenting opinion on the denial of the writ of certiorari.

A review on a writ of certiorari is not a matter of right, but of sound legal discretion, and will be granted only where there are special and important reasons therefor. U.S. Sup. Ct. Rule 19. The "Conditional Cross-Petition" of Fulton presents nothing worthy of review by this court. Fulton's claim in his Statement of the Case that the Court of Appeals did not give consideration to a number of points of error urged below, and refused to pass on Fulton's third point of error in his motion for a rehearing is inaccurate. The Appellate Court held that the trial court's charge to the jury viewed as a whole, accurately stated the law and was a substantially correct statement of the applicable law. 481 F. 2d 336, 339. If the Court of Appeals was in error in holding that the Carmack Amendment pre-empted common law liability, Fulton was not prejudiced thereby. He was allowed to put into evidence and to argue all of his common law negligence claims against the Rock Island. 481 F. 2d 336-337. There was no question as to the trial court's jurisdiction over the Rock Island such as was raised by the Soo Line. The question of conflict among the circuits can be settled by granting the Soo Line's Petition for a Writ of Certiorari. But Fulton should not be allowed to enlarge his own rights as to rehash arguments already passed on by clinging to the Soo Line's coattails.

CONCLUSION

For the above-stated reasons, as well as those detailed in the opinion below, Fulton's "Conditional Cross-Petition" for a Writ of Certiorari should be denied.

Respectfully submitted,

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